

implement the NPDES program supplement their NPDES CAFO requirements with additional State requirements. Some States currently regulate or manage CAFOs predominantly under State non-NPDES programs, or in conjunction with other water quality protection programs through participation in the CWA section 401 certification process (for permits) as well as through other means (e.g., development of water quality standards, development of TMDLs, and coordination with EPA). Several States have effective alternative or voluntary programs that are intended to help small and medium operations fix potential problems that could cause them to be defined or designated as a CAFO.

EPA is encouraging States to use their non-NPDES programs to help small and medium AFOs to reduce water quality impacts and to ensure that they do not become point sources under this regulation. To the extent the voluntary program eliminates the practice that results in the AFO's being defined or designated a CAFO, the AFO may not be required to obtain NPDES permit coverage. Given that EPA has not expanded the criteria for when AFOs would be defined as CAFOs, the Agency believes that States will have the flexibility necessary to leverage effective non-NPDES programs for medium and small AFOs. EPA has also offered specific examples of flexibility that permitting authorities can exercise.

Once a facility is determined to be a CAFO, however, coverage under a permit issued by a non-NPDES program will not satisfy the NPDES permit requirement. EPA is committed to work with States to modify existing non-NPDES State programs that currently regulate CAFOs to gain EPA's approval as NPDES-authorized programs. Such a change would require a formal modification of the State's authorized NPDES program, and the State would have to demonstrate that its program meets all of the minimum criteria specified in 40 CFR part 123, Subpart B, for substantive and procedural regulations. Among other things, these criteria include the restriction that permit terms may not exceed five years, procedures for public participation, and provisions for enforcement, including third party lawsuits and federal enforceability.

VI. Public Role and Involvement

The public has an important role in the entire implementation of the NPDES Program, including the implementation of NPDES permitting of CAFOs. The NPDES regulations in 40 CFR parts 122, 123, and 124 establish public

participation in EPA and State permit issuance, in enforcement, and in the approval and modification of State NPDES Programs. The purpose of this section is to provide a brief review of the key areas where the public has opportunities for substantial involvement. These opportunities for public involvement are long-standing elements of the NPDES Program. Nothing in today's final rule is intended to inhibit public involvement in the NPDES Program.

A. How Can the Public Get Involved in the Revision and Approval of State NPDES Programs?

Sections 123.61 and 123.62 of the NPDES regulations specify procedures for review and approval of State NPDES Programs. In the case of State authorization or a substantial program modification, EPA is required to issue a public notice, provide an opportunity for public comment, and provide for a public hearing if there is deemed to be significant public interest. To the extent that these final regulations require a substantial modification to a State's existing NPDES Program authorization, the public will have an opportunity to comment on the proposed modifications.

B. How Can the Public Get Involved if a State Fails To Implement Its CAFO NPDES Permit Program?

Section 123.64 of the NPDES regulations provides that any individual or organization having an interest may petition EPA to withdraw a State NPDES Program for alleged failure of the State to implement the NPDES permit program, including failure to implement the CAFO permit program.

C. How Can the Public Get Involved in NPDES Permitting of CAFOs?

Section 124.10 establishes public notice requirements for NPDES permits, including those issued to CAFOs. Under these existing regulations, the public may submit comments on draft individual and general permits and may request a public hearing on such a permit. Various sections of part 122 and § 124.52 allow the Director to determine on a case-by-case basis that certain operations may be required to obtain an individual permit rather than coverage under a general permit. Section 124.52 specifically lists CAFOs as an example point source where such a decision may be made. Furthermore, § 122.28(b)(3) authorizes any interested person to petition the Director to require an entity authorized by a general permit to apply for and obtain an individual permit. Section 122.28(b)(3) also provides

example cases where an individual permit may be required, including where the discharge is a significant contributor of pollutants. See § 122.23(f)(3) for opportunities for public involvement in the process for making a "no potential to discharge" determination (refer to section IV.B.2 of this preamble for further discussion). Nothing in today's final rule is intended to change these provisions.

D. What Information About CAFOs Is Available to the Public?

Today's rule requires that all CAFOs, Large, Medium, and Small, and whether covered by a general or an individual permit, report annually to the permitting authority the following information:

- The number and type of animals, whether in open confinement or housed under roof;
- The estimated amount of total manure, litter and process wastewater generated by the CAFO in the previous 12 months;
- The estimated amount of total manure, litter and process wastewater transferred to other person by the CAFO in the previous 12 months;
- The total number of acres for land application covered by the nutrient management plan;
- The total number of acres under control of the CAFO that were used for land application of manure, litter and process wastewater in the previous 12 months;
- A summary of all manure, litter and process wastewater discharges from the production area that have occurred in the previous 12 months, including date, time, and approximate volume; and
- A statement indicating whether the current version of the CAFO's nutrient management plan was developed or approved by a certified nutrient management planner.

EPA expects that the permitting authority will make this information available to the public upon request. This should foster public confidence that CAFOs are complying with the requirements of the rule. In particular, the information in the annual report will confirm that CAFOs have obtained coverage under an NPDES permit, are appropriately controlling discharges from the production area, and have developed and are implementing a nutrient management plan. The annual report will also provide summary information on discharges from the production area and the extent of manure production and available land application area. This will help foster public confidence that the manure is being land applied at rates that ensure

appropriate agricultural utilization of nutrients.

Today's rule makes no changes to the existing regulations concerning how CAFOs may make Confidential Business Information (CBI) claims with respect to information they must submit to the permitting authority and how those claims will be evaluated. Under the existing regulations at 40 CFR Part 2, Subpart B, a facility may make a claim of confidentiality for information it must submit and EPA must evaluate this claim if it receives a request for the information from the public. Among the factors that EPA considers in evaluating such a claim are:

- Must the information be legally provided to the public under the Clean Water Act, its implementing regulations, or other authorities? If so, a claim of confidentiality will be denied.
- Has the facility adequately shown that the information satisfies the requirements for treatment as CBI? If yes, the claim of confidentiality will be upheld.

Claims of confidentiality with respect to information submitted to the State will be processed and evaluated under State regulations.

What was proposed? In the proposal, EPA discussed submission of the PNP to the permitting authority and its availability to the public. The proposed regulations would have required the cover sheet and executive summary of each CAFO's PNP to be made publicly available. EPA proposed that the information contained in these items could not be claimed as CBI. The proposed regulations indicated that anything else in the PNP could be claimed as confidential by the CAFO, and any such claim would be subject to EPA's normal CBI procedures in 40 CFR Part 2. See § 122.23(l) of the proposal.

Key comments. Industry commenters claimed that the PNP would contain proprietary information. They stated that EPA should protect these plans as CBI where requested by the CAFO. They claimed that making the PNP publicly available would discourage innovation in developing waste management technologies and could make CAFOs vulnerable to unwarranted lawsuits. Environmental groups stated that the PNP must be publicly available, or

citizens would have no way of ensuring that CAFOs are adequately developing and implementing the PNPs. They also expressed concerns about the burden of traveling to the permitting authority's offices to gain access to the plans. They stated that the plans should be made more accessible to them by the permitting authority, either by mail or by posting on the internet.

Rationale. The final CAFO regulations require that various types of information on the operation and waste management practices of the facility be made available to the permitting authority, either routinely or upon request. The permitting authority has discretion, subject to applicable regulations, to determine how much of this information to make available to the public and in what manner. The Annual Report that all CAFOs must submit is designed to provide the permitting authority with summary information about the implementation of the nutrient management plan. EPA believes that the information the public is most interested in seeing is contained in the Annual Reports.

With respect to the contents of the nutrient management plan, specifically, today's rule requires that the nutrient management plan be maintained on-site at the CAFO and submitted only at the request of the permitting authority. Upon submission of the nutrient management plan to the permitting authority, the CAFO operator can assert a confidential business information claim over the plan, in accordance with applicable regulations. If the permitting authority receives a request for the information, it will determine the validity of the claim and provide the requester with information in accordance with the findings of the determination and applicable regulations.

As noted, today's rule makes no changes to the existing regulations concerning how facilities may make CBI claims with respect to information they must submit to the permitting authority and how those claims will be evaluated. Any changes to how the Agency handles the issue of confidential business information are beyond the scope of today's rule and would have broad implications across a number of EPA

programs. Instead EPA will evaluate future CBI claims based on the applicable laws and regulations (see, e.g., CWA Section 402(j), 40 CFR Part 2, Subpart B, and 40 CFR 122.7).

VII. Environmental Benefits of the Final Rule

A. Summary of the Environmental Benefits

This section presents EPA's estimates of the environmental and human health benefits, including pollutant reductions, that will occur from this rule. Table 7.1 shows the annualized benefits EPA projects will result from the revised ELG requirements for Large CAFOs. (Monetized values for benefits associated with the revised NPDES requirements for Small and Medium CAFOs are not included in the table.) The total monetized benefits associated with the ELG requirements for Large CAFOs range from \$204 to \$355 million annually. The values presented in the range represent those benefits for which EPA is able to quantify and determine an economic value. These benefit value estimates reflect only those pollutant reductions and water quality improvements attributable to Large CAFOs. EPA also developed estimates of the pollutant reductions that will occur due to the revised requirements for Small and Medium CAFOs, but analysis of the monetized value of the associated water quality improvements was not completed in time for benefits estimates to be presented here. As discussed later in this section, EPA has also identified additional environmental benefits that will result from this rule but is unable to attribute a specific economic value to these additional nonmonetized or nonquantified benefits.

Detailed information on the estimated pollutant reductions is provided in the *Technical Development Document*, which is in the docket for today's rule. EPA's detailed assessment of the environmental benefits that will be gained by this rule, as well as the benefits estimates for other regulatory options considered during this rulemaking, is presented in the *Benefits Analysis*, which is also available in the rulemaking docket.

TABLE 7.1.—ANNUALIZED BENEFITS OF ELG REQUIREMENTS FOR LARGE CAFOS
[Millions of 2001\$]

Types of benefits	Total for all CAFOS
Recreational and non-use benefits from improved water quality in freshwater rivers, streams, and lakes.	\$166.2 to \$298.6.
Reduced fish kills	\$0.1.
Improved shellfish harvests	\$0.3 to \$3.4.